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Stephen Tierney and Katie Boyle: Yes or No, Scotland's Referendum Carries Significant Constitutional Implications

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Following the [Edinburgh Agreement](#) (in which the UK Government agreed to devolve the power to hold the referendum to the Scottish Government through a section 30 Order passed by the UK Parliament) the statutory framework for the referendum process has now been largely agreed by the Scottish Parliament and legislated for in the [Scottish Independence Referendum \(Franchise\) Act 2013](#) and the soon to be enacted [Scottish Independence Referendum Bill](#) which passed Stage 2 of the legislation process in the Scottish Parliament on 10 October 2013.

According to the [policy memorandum](#) of the Scottish Independence Referendum Bill, the main objective of the legislation is for the referendum "*to be (and to be seen to be) a fair, open and truly democratic process which is conducted and regulated to the highest international standards.*" The legitimacy of the referendum process can help engender legitimacy in the outcome of the referendum. It has been argued in recent research ([Constitutional Referendums](#)) that the legitimacy of a referendum's process can be measured against deliberative democracy benchmarks and international standards.

The benchmarks, which are also informed by civic republican theory, address critical objections to the operation of the referendum as a mechanism for constitutional decision making. The three main criticisms of the use of referendums are: (i) the elite control syndrome (where referendums are conducted in a controlled environment, for example where the executive operates without proper oversight by the legislature); (ii) the deliberation deficit (where there is no meaningful opportunity for, or encouragement of, deliberation by the electorate of the substantive issues); and finally, (iii) the majoritarian danger (in which the views of minorities and individual interests are lost in the exercise of majoritarian decision making). In order to overcome these objections certain principles should inform the deliberative referendum process, namely:

- popular participation (in which the informed citizen is able to make an informed decision)
- public reasoning (whereby the electorate is able to participate meaningfully in a deliberative process)
- inclusion and parity of esteem (whereby the referendum process is inclusive and minorities are given an opportunity to participate fully), and
- consent in collective decision making (whereby the process has been fair and inclusive, allowing for all participants to accept the outcome as a legitimate exercise of collective decision making).

International guidance does exist to help inform the Scottish referendum. In terms of best international practice, the European Commission for Democracy through Law (the Venice Commission) has issued [guidance](#) in relation to constitutional referendums. In order to ensure fairness in the process the Commission has recommended that voters must be informed of the consequence of the referendum. Likewise, the Commission recommends that the authorities must provide objective information where there is a balanced report of the viewpoints of both sides of the debate as to the outcome of the vote.

And within the UK there is also a detailed regime of regulation under the Political Parties, Elections and Referendums Act 2000. Among its provisions it gives a significant role to the independent Electoral Commission in regulating referendums. On the issue of information to voters, [the Electoral Commission has recommended](#) that both governments should provide objective information and try to come to agree a joint position, so far as possible, on what the implications of a yes vote would be, in particular, by clarifying the process that would follow the referendum. The Electoral Commission cannot set out the terms of what independence would mean but [has agreed to consider including any joint position agreed by both Governments in their information booklet](#) on the referendum to be provided to each household as part of its public awareness campaign in the lead up to the referendum. The Electoral Commission has set a [deadline](#) (20 December 2013) for a joint position to be reached.

The principles and standards that ought therefore to underpin the referendum process relate not only to the pre-referendum process. Regardless of the outcome of the referendum, but in particular in the event of a yes vote, it is also important that in the post-referendum landscape citizens are able to participate in a deliberative process in which the result of the referendum, and whatever constitutional future it leads to, can be fulfilled in an open, deliberative and reflective environment.

And indeed one of the key themes emerging around the referendum is what form Scotland's new constitutional arrangements may take in the event of a yes vote. Given the contested nature of the outcome there are obviously competing visions of Scotland's constitutional future. One of the main difficulties underpinning the referendum process is therefore providing the electorate with the requisite standard of impartial information on the constitutional implications of the referendum. However, what we can do is look at what the proposals are so far, not just in terms of the constitutional implications of a yes vote, but also what constitutional consequences, if any, may result from a no vote.

Constitutional Implications of a Yes Vote

Earlier this year the Scottish Government published an interim paper, [Scotland's Future: from the Referendum to Independence and a Written Constitution](#), which sets out a two stage process in the event of a yes vote. This anticipates a 15 month transitional period in which the substantive terms of independence will be negotiated between the Scottish and UK Governments, following which independence would be granted in March 2016; a constitution-framing process is intended to begin after the first parliamentary elections take place in May 2016. First Minister Alex Salmond has indicated that one of the first tasks of the newly elected legislature of an independent Scotland would be [to establish the process for Scotland's first written constitution through a constitutional convention](#). The Scottish Government also intends to deliver a White Paper on 26 November this year that sets out the choice people will be making when they vote in the referendum in terms of [the structure of the state and the starting point of an independent Scotland](#).

A significant issue in the event of a yes vote will be the constitutional status of Scotland in relation to the UK during the period of negotiated separation from September 2014 to March 2016. There will be a period of constitutional flux as sovereignty and competence to make laws in relation to reserved matters will be in a state of legal 'limbo'. The Scottish Government has addressed the transfer of competence on reserved matters stating that nothing will change in relation to reserved matters until the newly elected parliament of an independent Scotland chooses to change them. On this basis, sovereignty would therefore be transferred on an incremental basis and the shift in the status of UK-sourced law would be phased out rather than come to an abrupt stop.

There may also, therefore, be an opportunity for a proposed interim constitution with provision for the continuity of existing legislation passed in Westminster post-independence day, such as for example, the provisional arrangements in the South African interim constitution (section 229 of the South African Interim Constitution provided for the transitional continuation of laws existing prior to the formation of the new constitution). This could be particularly significant in reference to what status human rights might take in both the transitional period and post-independence day landscape. For example, will the Human Rights Act 1998 continue to apply? The Scottish Government has suggested that a constitution for an independent Scotland could contain protection of rights beyond those contained in the ECHR (such as socio-economic rights and environmental rights). However, there is no indication as yet as to how such rights would be framed and whether such rights will be aspirational, legally binding or even judicially enforceable, nor is there an indication as to whether a future Scottish Parliament will be able to issue declarations of incompatibility rather than the more stringent current arrangements (where an Act of the devolved Scottish Parliament is *ultra vires* and therefore invalid if incompatible with ECHR rights).

During this transitional period compliance with the deliberative democracy principles will still be important. Questions as to how to ensure popular participation in the constitution-framing process may well be addressed through the proposed constitutional convention. However, it remains to be seen how exactly the convention will be constituted and how it will operate. Also will there be sufficient safeguards in place to allow for an inclusive process (the proposal promises to include political parties, the wider public and civic Scotland)? Should an interim constitution be proposed the [Law Society of Scotland](#) has also questioned what measures will be taken to ensure that the interim provisions avoid locking Scotland into *de facto* unchangeable constitutional arrangements in pre-independence negotiations. There will also be questions as to whether proposals sufficiently protect marginalised or minority groups, in particular, the status of human rights under a new constitutional order will require close scrutiny.

The White Paper may well address many of these issues. Although there is a great deal of uncertainty as to the constitutional implications of a yes vote, it would appear that there is a commitment by the Scottish Government to set out a constitutional roadmap and that may lead from the post-referendum process into an on-going engagement with the public directly in a deliberative constitution-making process. Arguably, such a process will help enhance the legitimacy of the transition to independence, and would certainly be preferable to a top-down constitutional model that had not undergone a deliberative and inclusive process. On the other hand, the lack of certainty may deter many voters from taking a risk on such a transformative change from the status quo. Bearing this in mind it is also important to consider what constitutional implications, if any, would result in the eventuality the electorate vote no to independence.

The constitutional implications of a no vote

"As much as people in Scotland deserve to know the consequences of a 'yes' vote in the referendum, we believe the electorate deserve to know as far as possible the consequences of a 'no' vote" – [Law Society of Scotland](#)

The implications of the Scottish Independence Referendum go beyond the future sovereignty and constitutional framework of Scotland and involve a wider debate on the constitutional future of the UK as a whole. There is momentum growing within the UK to revisit the constitutional arrangements under the current uncoded constitution (See for example the recent post by Sean Kippin and Jack Bailey on [Crowdsourcing the UK's constitution: why the status quo is not an option](#)). There are also question marks over the future status of the Human Rights Act 1998 and the future of the UK as a Member State of the Council of Europe and European Union. The Political and Constitutional Reform Committee of the House of Commons has also questioned whether it is time for a UK constitutional convention (see here – [Do we need a constitutional convention for the UK?](#)).

On the status of Scotland in any rearranged UK constitutional framework, Gordon Brown has recently suggested the codification of a written constitution for the United Kingdom in which the status of the Scottish Parliament ought to be [permanent, irreversible and indissoluble](#).

Each individual political party will have different visions of what constitutional future the UK might take, and what role Scotland ought to play in the future. Outstanding questions that remain to be answered relate to what alternative models are on the table besides the status

quo or independence. Again, whatever the constitutional future, process is as important as substance. In this regard the 2014 referendum should offer very useful lessons as to how best to organise a referendum. At the end of this event, and regardless of the result, it will be important to assess how well citizens were engaged, how well they were informed, and how deliberative the debate as a whole proved to be.

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